85-1100

No. .....

Supreme Court, U.S.
FILED
DEC 6 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

(UNDER SEAL)

Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

WILLIAM C. BRENNAN, JR. *
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4178

QUESTION PRESENTED

MAY THE GOVERNMENT COMPEL THE ATTORNEY OF A GRAND JURY'S TARGET TO DISCLOSE INFORMATION REGARDING RETAINER TERMS AND FEES PAID?

PARTIES

Since this case involves a grand jury proceeding normally covered under the secrecy provisions of Rule 6(e) of the Federal Rules of Criminal Procedure, it was originally captioned "United States of America v. (Under Seal)." The only parties to the proceeding are the United States Government, the grand jury target (hereinafter referred to as the "Petitioner"), and the target's attorney, (hereinafter the "Petitioner's Attorney"), upon whom the grand jury subpoena was served.

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OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland was delivered under seal by Senior Judge Northrop and is unreported. The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 774 F.2d 624 (1985).

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on October 8, 1985. This petition for a writ of certiorari was timely filed within sixty (60) days of the judgment of the Court of Appeals. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V

"No person...shall be compelled in any criminal case to be a witness against himself."

United States Constitution, Amendment VI

"In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

Beginning in February, 1981, the Petitioner retained an attorney to represent him in various criminal matters. Although he never received a letter from the United States Attorney to this respect, the Petitioner suspected that he was the target of a federal grand jury investigation early in 1984 when his wife was subpoenaed to testify regarding the couple's finances. At that time he advised his attorney of this sus-

picion and began to consult the attorney for legal advice while the investigation progressed.

During this investigation, and while he was advising the Petitioner, the attorney received the subpoena now in question. He was commanded to appear before the Grand Jury and produce

> all records regarding passports, fees, etc., paid your firm, or you personally [by the Petitioner or his family and]... any other documents in your possession relating to any financial transaction; their financial position, or money accepted or disbursed for any of the above, for any reason. (4a)

Upon receiving the subpoena, the attorney advised his client that an attorney's being made a government witness creates a conflict of interest and that the Petitioner should retain other counsel to represent his interests. Subsequently, the Petitioner did retain other counsel to file, on his behalf, a Motion to Quash the Grand Jury Subpoena. The Motion was filed on November 27, 1984, a hearing was held before Senior District Judge Northrop, and the Motion was denied.(18a-24a)

The Petitioner filed a timely appeal to the United States Court of Appeals for the Fourth Circuit, from the order denying his Motion to Quash. He also filed, with the District Court, a Motion for Stay of Order Pending Appeal. The Motion for Stay was denied (25a-28a), and the Gov- ernment's Motion to Remove Documents Placed Under Seal was granted.(29a-30a) [1] Subsequently, after the filing of briefs and presentation of oral argument, the Court of Appeals issued a published opinion affirming the District Court Order denying the Petitioner's Motion to Quash Grand Jury Subpoena. (1a-17a) Judgment was entered in accordance with that opinion on October 8, 1985, and this petition was timely filed within 60 days of that judgment.

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1 Should the petitioner prevail or appeal the government has agreed not to use, directly or derivatively, the materials turned over pursuant to the supoena.

REASONS FOR ALLOWANCE OF THE WRIT

It is well recognized among the Circuits that grand jury subpoenas are "almost universally instrumentalities of the United States Attorney's office or of some other department of the executive branch." In re Grand Jury Matters, 751 F.2d 13, 16 (1st Cir.1984), citing In re Grand Jury Proceedings (Schofield), 486 F.2d 85, 90 (3d Cir.1973), and In re Special Grand Jury No. 81-1 (Harvey), 676 F.2d 1005, 1010 (4th Cir. 1982), vacated on other grounds, 697 F.2d 112 (4th Cir.1982). Although issued on behalf of the grand jury and in the name of the district court, they require no prior court approval. Harvey, 676 F.2d at 1010, See also Fed.R.Crim.P. 17(a); Grand Jury Matters, 751 F.2d at 16. Thus, the question under consideration is whether the government may, through the grand jury subpoena process, require an attorney for the grand jury's target to

disclose information about their attorney-client relationship.

In this case, the Government has, by grand jury subpoena, commanded the petitioner's attorney to disclose financial information of his client, including the fees paid for his representation. The Petitioner contends that such disclosure violates his Sixth Amendment right to counsel, his attorney-client privilege, and his Fifth Amendment privilege against self-incrimination. Citing slim case law, the Court of Appeals simply holds that "enforcing the subpoena does not violate these rights and privileges."(2a)

Although the Fourth Circuit's opinion does not so acknowledge, the subject of subpoenaing attorneys is one of great controversy at the present time. And the circuits are by no means in agreement on this important question of federal and constitutional law. Indeed, prior to the instant case, the Fourth Circuit held that

> when a subpoena is issued against an attorney in an ongoing attorney-client relationship, the attorney may well be placed in the position of becoming a witness against his client or risking contempt. In either case, there is a strong possibility that a wedge will be driven between the attorney and the client and the relationship will be destroyed.

In re Grand Jury No. 81-1 (Harvey), 676 F.2d 1005, 1009 (4th Cir.1982), vacated on other grounds, 697 F.2d 112 (4th Cir. 1982).

Likewise, the United States Court of Appeals for the First Circuit recently upheld a district court decision quashing subpoenas served upon defense attorneys, recognizing that they "could be taken as a veiled threat, with such potential for harm to the ... defendants and the defense bar as to require the government to show with some particularity [an urgent need]." In re Grand Jury Matters, 751 F.2d 13, 18 (1st Cir.1984). Additionally, a federal district court in Pennsylvania was "disturbed by the practice of calling a lawyer before a grand jury which is investigating his client...[since] the

dangers and disadvantages of the practice have been demonstrated in such cases as In re Terkeltoub, 256 F.Supp. 683(S.D.N.Y.1970); and In re Stolar, 397 F.Supp. 520 (S.D.N.Y.1975)". In re Grand Jury Investigation (Sturgis), 412 F.Supp. 943 (E.D.Pa.1976).

The American Bar Association has

> expressed its concern about the increasing number of instances nationally in which criminal defense lawyers are themselves subpoenaed to testify before the grand juries. Abuse of grand jury subpoenas used against persons having recognized confidential relationships appears to be increasing; this...has a chilling effect on Sixth Amendment rights and confidential relationships.

American Bar Association, Policy on the Grand Jury (1977). See also, A.B.A. Grand Jury Principles #23 and #29. Indeed, the problem is viewed as so substantial that seminars on the subject have been held over the past few months in Washington, Chicago, and New York. See, e.g., American Bar Association, Section of Criminal Justice, Criminal Justice, vol. 12, No.

3, p. 5 (March, 1985); 37 Crim. L. Rep. 2480 (1985).

In recognition of the constitutional dangers inherent in the practice of issuing subpoenas to attorneys, several courts have required that the government demonstrate both the relevance and the need to subpoena a lawyer. See, e.g., In re Doe, 759 F.2d 968 (2d Cir.1985); In re Grand Jury No. 81-1 (Harvey), 676 F.2d 1005 (4th Cir.1982), vacated on other grounds, 697 F.2d 112 (4th Cir.1982); United States v. Badalamenti, No. S.S.84 Cr.236(PNL) (S.D.N.Y. July 10, 1985), 37 Crim.L.Rep. 2813. Other courts have declined to adopt such a requirement. See, e.g., In re Grand Jury Investigation (Harvey), No. 85-8513 (11th Cir. August 15, 1985) 37 Crim.L.Rep.2164; In re Sinadinos, 760 F.2d 167 (7th Cir.1985); In re Grand Jury Proceedings (Doe), 754 F.2d 154, (6th Cir.1985).

In addition, both the U.S. Attorney for the

Southern District of New York and the Department of Justice have issued guidelines for the issuance of lawyer subpoenas. 37 Crim.L.Rep. 2100 (1985) and 37 Crim.L.Rep. 2479 (1985). The Justice Department guidelines acknowledge that "because of the potential effects upon an attorney-client relationship that may result to the representation of a client, it is important that the Department exercise close control over the issuance of such subpoenas." U.S. Atty. Manual Section 9-2.161(a), reprinted at 37 Crim.L.Rep.2480 (1985).

While these opinions and prosecutorial guidelines represent admirable attempts to address the problem of subpoenaing attorneys, they clearly do not resolve it. The guidelines are not statement of the law, and the court decisions so conflict as to make the law unclear. The instant case clearly presents the issue so that this Court may settle the important questions arising under constitutional and federal law.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully Submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1077

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United States of America,

Appellee,

v.

(Under Seal),

Appellant.

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In Re: Grand Jury Subpoena Served upon
William J. Garber, Esq.

Ronald Humphries, Movant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Edward S. Northrop, District Judge. (C/A 84-4282).

Argued: August 13, 1985
Decided: October 8, 1985

Before MURNAGHAN and CHAPMAN, Circuit Judges and HAYNSWORTH, Senior Circuit Judge

William C. Brennan, Jr. (Knight, Manzi, Brennan & Ostrom, P.A. on brief) for Appellant; Robert J. Mathias, Assistant United States Attorney (J. Frederick Motz, United States Attorney on brief) for Appellee.

CHAPMAN, Circuit Judge:

On January 4, 1985, the United States District Court for the District of Maryland issued an order denying appellant's motion to quash a grand jury subpoena served upon his attorney, William J. Garber. The subpoena instructed Garber to produce certain documents and records regarding fees paid by or on behalf of appellant for Garber's legal representation of appellant in connection with a narcotics conspiracy case in the United States District Court for the District of Columbia in 1981. Appellant maintains that enforcing the subpoena violates his sixth amendment right to counsel, his attorney-client privilege, and his fifth amendment privilege against self-incrimination. We hold that enforcing the subpoena does not violate these rights and privileges and accordingly affirm the district court's order.

I

In March 1981 appellant retained Garber to represent him in a narcotics conspiracy case in the United States District Court for the District of Columbia. According to Garber's handwritten fee notations and receipts delivered to the United States Attorney's office pursuant to the subpoena in question, appellant paid $12,5000 in cash to Garber during 1981 pursuant to their retainer agreement. Appellant paid Garber an additional $1500 in cash in 1982 and another $500 in cash in both September 1983 and January 1984. According to Garber's record, appellant made no further payments and the account was closed as of the end of 1984.

Appellant claims that he began to suspect that he was the target of a grand jury investigation early in 1984 when a federal grand jury in the District of Maryland issued a subpoena to his wife to testify regarding the couple's

finances. Appellant further claims that he advised Garber of his suspicion and began to consult Garber for legal advice as the investigation progressed. However, there is no evidence in the record that appellant ever paid Garber any fees or entered into any retainer agreement in connection with the criminal tax investigation by the grand jury in the District of Maryland.

On October 18, 1984, the same grand jury issued a subpoena to Garber seeking documents regarding fees paid by or on behalf of appellant. More specifically, the subpoena instructed Garber to appear before the grand jury and produce "[a]ll records regarding passports, fees, etc., paid your firm, or you personally [by appellant or his family] . . . [and] [a]ny other documents in your possession relating to any financial transaction; their financial position, or money accepted or disbursed for any of the above, for any reason." This grand jury

investigation included potential criminal tax violations by appellant for the years 1979 to 1982, and subsequent years. The only documents falling within the scope of the subpoena were a retainer agreement dated March 4, 1981, a handwritten sheet containing notations made under the agreement, and five receipt stubs from a receipt book in Garber's office. All of these documents related solely to the 1981 criminal narcotics case in the District of Columbia.

The United States claims that Garber indicated that he had no personal basis for opposing production of the documents but would discuss it with appellant. Appellant claims that Garber advised him that complying with the subpoena would place him in a position of an attorney-witness which created a conflict of interest with appellant. Appellant also claims that Garber then suggested that he retain other counsel to represent him.

On November 27, 1984, appellant, through new counsel, filed a motion to quash the grand jury subpoena issued to Garber. The government opposed [illegible]ion to quash. On January 4, 1985, following a hearing, the district court denied appellant's motion to quash and filed a memorandum opinion and order.

The principal issue before the district court was whether the documents requested by the grand jury from Garber were concerned with or related to the attorney-client relationship between Garber and appellant and were thus privileged matters not discoverable by subpoena. Because Garber notified the United States Attorney's office that the only documents in his possession were documents regarding fees paid by or on behalf of appellant, the district court considered the arguments presented only as they related to the production of documents regarding legal fees. The district court properly placed on appellant the burden of showing the attorney-client privilege as to these documents.

Appellant then presented the documents at issue to the district court for in camera review. Appellant also filed a notice of appeal and moved the district court for a stay of its January 4, 1985 order, pending appeal. On January 21, 1985, the district court denied appellant's motion for a stay pending appeal and filed a memorandum opinion and order. After in camera consideration of the submitted documents, the district court found little or no likelihood that appellant would prevail on the merits because the documents in issue solely concerned fee arrangements and payments and thus were the type of documents not covered by the attorney-client privilege. The district court also found that the submitted documents did not fall within any other exception which might preclude their admissibility. Finally, the district court concluded that if the documents were later found to be privileged, appellant could move to suppress them in any criminal proceedings against him.

The United States filed a motion to remove the documents placed under seal, which the district court granted. The documents in question were then released to the grand jury. This appeal followed.

II

In the appeal we must decide whether the district court should have quashed a subpoena issued by a federal grand jury in the District of Maryland to an attorney who represented appellant in connection with a narcotics conspiracy case in the United States District Court for the District of Columbia in 1981, seeking documents regarding fees paid by or on behalf of appellant for the prior legal representation, merely because appellant now alleges that the attorney would be his counsel of choice in the present grand jury investigation but for the subpoena. Appellant argues that enforcing such

a subpoena in this case violates his sixth amendment right to counsel, his attorney-client privilege, and his fifth amendment privilege against self-incrimination.

A

The first issue on appeal is whether the compelled disclosure of the subpoenaed information violates appellant's sixth amendment right to the effective assistance of counsel. The sixth amendment provides that [i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." The effective assistance of counsel is one of the "fundamental rights of the accused," Glasser v. United States, 315 U.S. 60, 72 (1942), and an essential element of due process. Powell v. Alabama, 287 U.S. 45 (1932). Part of this fundamental right is the right to retain counsel of one's choice.

United States v. Sheiner, 410 F.2d 337, 342 (2d Cir. 1969), cert. denied, 396 U.S. 825 (1969); United States v. Seale, 461 F.2d 345, 358 (7th Cir. 1972).

Appellant argues that enforcing the subpoena in question would violate his sixth amendment right to effective assistance of counsel by denying him the counsel of his choice. Appellant observes that Garber represented him in his prior criminal narcotics case in the District of Columbia and asserts that, but for the subpoena in question, Garber would be his counsel in the present grand jury investigation. In other words, appellant contends that by enforcing the subpoena in question, and thus compelling Garber to produce the supoenaed documents, Garber is forced into becoming a witness against him and he is forced into retaining other counsel to avoic the resulting conflict of interest. Although appellant apparently concedes that the subpoena merely seeks to

determine the relatively simple matter of what expenditures for attorney's fees appellant made during 1981 and subsequent years, appellant nevertheless contends that this fact does not obviate the potential conflict of interest because he may find it necessary to cross-examine Garber about this matter.

We are unable to accept appellant's argument that compelling the disclosure of the subpoenaed documents, and thus possibly placing Garber in the position of a witness against him, denies appellant his sixth amendment right to counsel of his choice.

First, we see no conflict in Garber's further representation of appellant especially in view of the government's statement that it is prepared to consider any number of ways to have the information produced which would not disqualify Garber. For example, the government suggests that Garber could supply the fee information in a sworn statement and the information

could be admitted at trial through a stipulation or through the testimony of another party such as a bookkeeper. We agree.

Second, if we were to find a sixth amendment violation here, we would be holding that fee payments would never be discoverable by a grand jury so long as there remained a possibility of further representation by the same attorney. We are unable to accept this proposition.

B

The second issue is whether enforcing the subpoena, and thus compelling Garber to disclose the subpoenaed information, violates appellant's attorney-client privilege. As appellant concedes, the attorney-client privilege normally does not extend to the payment of attorney's fees and expenses. In re Grand Jury Proceedings (United States v. Jones), 571 F. 2d 666, 670-71 (5th Cir. 1975) ("'[T]he identity of a client is

a matter not normally within the privilege . . . nor are matters involving the receipt of fees from a client usually privileged.'") (emphasis in Jones) (citations omitted). See also In re Grand Jury Proceedings (Pavlick), 680 F.2d 1026, 1027 (5th Cir. 1982) ("We have long recognized the general rule that matters involving the payment of fees and the identity of clients are not generally privileged."); United States v. Haddad, 527 F.2d 537, 538 (6th Cir. 1975), cert, denied, 425 U.S. 974 (1976) ("In the absence of special circumstances, the amount of money paid or owed to an attorney by his client is generally not within the attorney-client privilege.") (citations omitted).

Appellant attempts to circumvent this general rule by relying upon an exception recognizing a privilege "where the person invoking the privilege can show that a strong probability exists that disclosure of such information would implicate that client in the

very criminal activity for which legal advice was sought." United states v. Hodge and Zweig, 548 F.2d 1347, 1353 (9th Cir. 1977). See also In re Grand Jury Proceedings (United States v. Jones), 571 F.2d at 671; Baird v. Koerner, 279 F.2d 623, 635 (9th Cir. 1960); Tillotson v. Boughner, 350 F.2d 663 (7th Cir. 1965). That narrow exception, however, does not apply under the facts and circumstances of this case. Appellant retained Garber in connection with a criminal narcotics case in the United States District Court for the District of Columbia in 1981. The current grand jury investigation in the District of Maryland involves potential criminal tax violations by appellant. Thus, there is no "strong probability," or even likelihood, that disclosure to the federal grand jury in the District of Maryland of attorney's fee paid in connecton with the 1981 narcotics case in the District of Columbia would implicate appellant in the criminal narcotics conspiracy.

Even if appellant had consulted Garber in connection with the current criminal tax investigation, the documents at issue do not concern payment of legal fees as to this investigation and thus the exception does not apply. Appellant has provided no basis for any exception of the general rule and thus the attorney-client privilege does not prevent the disclosure to the grand jury.

C

The third issue is whether enforcing the subpoena violates appellant's fifth amendment right against self-incrimination. Appellant argues that enforcing the subpoena would violate his fifth amendment privilege against self-incrimination. This argument is apparently based upon the assertion that since the grand jury could not compel appellant to state how much he paid Garber, the grand jury should not

be allowed to compel such information from Garber.

This argument is without merit. In Fisher v. United States, 425 U.S. 391 (1976), the Supreme Court expressly held that a subpoena of a taxpayer's personal papers from an attorney does not violate the taxpayer's fifth amendment privilege because the accused is not personally compelled to produce the documents. More recently, in SEC v. Jerry T. O'Brien, Inc., 104 S.Ct. 27260, 2725-26 (1984), the Supreme Court held that a person inculpated by materials sought by subpoena issued to a third party cannot seek shelter in the fifth amendment because the subpoena does not compel anyone to be a witness against himself. The grand jury subpoena in this case does not require appellant to do anything and certainly does not compel him to be a witness against himself. Thus, the fifth amendment provides no basis for quashing the subpoena issued to Garber.

Accordingly, the order of the district court denying appellant's motion to quash the subpoena issued to Garber is

Affirmed.

MATTER UNDER SEAL

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE: GRAND JURY SUBPOENA SERVED UPON WILLIAM J. GARBER, ESQ.	*	Civil Action No. N 84-4282
RONALD HUMPHRIES, Movant	*	

ORAL OPINION

Before this Court is a motion by Mr. Ronald Humphries to quash a subpoena served upon Mr. William J. Garber by the United States. Mr. Garber was formerly Mr. Humphries' attorney. Mr. Humphries claims the documents requested by the United States from Mr. Garber concern and relate to their attorney-client relationship and, thus, are privileged matters not discoverable by subpoena. The United States denies the documents are privileged. The parties have submitted supporting memoranda to the Court, and a hearing has been held.

Although the subpoena served upon Mr. Garber is facially quite broad, the Government's Opposition to the Motion to Quash presents only

a limited issue. In its Opposition, the Government informs the Court that Mr. Garber contacted the United States Attorney's Office and indicated that the only documents in his possession within the scope of the subpoena were documents regarding fees paid by or on behalf of Mr. Humphries. This Memorandum and Order will, therefore, be directed only at the production of documents regarding the above legal fees.

The attorney-client privilege is deeply rooted in the common law. It was founded in the interest and administration of justice to allow a client to be free from the consequences or apprehensions of full disclosure to his attorney. Hunt v. Blackburn, 128 U.S. 464, 470 (1888). The privilege protects the substance of communications and, thus, has been extended to communications not only made by a client but also originating from an attorney if the communication is based on confidential

information provided by the client. In re: Grand Jury 83-2, _ _ _ F.2d _ _ _ , Slip Opinion at 6 (4th Cir., Nov. 16, 1984).

Because the privilege impedes the general duty to assist in the investigation of the truth, it is strictly construed. In re: Grand Jury Proceedings, 727 F.2d 1352, 1355 (4th Cir. 1984). The proponent of the privilege has the burden of demonstrating it applicability. Unites States v. Jones, 696 F.2d 1069, 1072 (4th Cir. 1982). The proponent must show the existence of the communication, its privileged nature, and that the privilege has not been waived. Id.

The privilege is not absolute. It extends only to communications intended to be confidential. In re: Grand Jury Proceedings, 727 F.2d 1352, 1355 (4th Cir. 1984). The Fourth Circuit has adopted the following standard for confidentiality: where the matter was expressly made confidential by the client, or should have been reasonably understood by the attorney as so

intended. Id. at 1356. The mere relationship of attorney-client does not warrant a presumption of confidentiality. Id.

A layman, however, generally expects some degree of confidentiality in his communications with his attorney. Often, rather than looking to the existence or absence of a specific request for confidentiality, we look to the services for which the attorney has been employed and then determine what communications were reasonably expected to be confidential. In re: Grand Jury 83-2, ___ F.2d ___, Slip Opinion at 9-10 (4th Cir., Nov. 16, 1984).

Confidentiality is, however, not the only requirement. The communication must be within the scope of legal services to be rendered by the attorney. This is a requirement found in the classic test for application of the privilege set forth in United States v. United Shoe Machinery Corp., 89 F.Supp. 357, 358-59 (D.Mass. 1950) and adopted by the Fourth Circuit. E.g., United States v. Jones, 696 F.2d

1069, 1072 (4th Cir. 1982). To quote United Shoes, supra: "The privilege applies only if . . . the communication relates to a fact of which the attorney was informed . . . for the purpose of securing primarily either (i) an opinion of law or (ii) legal services or (iii) assistance in some legal proceeding . . . ." Id. at 358-59.

This has generally meant that communications not referring to the "subject matter" of the legal services or opinion sought are not privileged. These often include, inter alia, the terms of the employment. N.L.R.B. v. Harvey, 349 F.2d 900, 904 (4th Cir. 1965). Behrens v. Hironumus, 170 F.2d 627, 628 (4th Cir. 1948). This means that "[i]n the absence of special circumstances, the amount of money paid or owed to an attorney by his client is generally not within the attorney client privilege." United States v. Haddad, 527 F.2d 537, 538 (6th Cir. 1975).

The movant, thus, has the burden of showing the privilege, and must satisfy the requirements of United Shoe, supra, - - namely, confidentiality and scope of legal matters.

If, upon considering this bench opinion, the movant may still object to the production of some documents, the Court will review in camera disputed documents and determine whether they are privileged or not.

/s/
Edward S. Northrop
Senior United States District Judge

Dated: 4th January 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE: GRAND JURY SUBPOENA SERVED UPON WILLIAM J. GARBER, ESQ.	*	Civil Action No. N 84-4282
RONALD HUMPHRIES, Movant	*	

ORDER

In accordance with the foregoing Oral Bench Opinion issued by the undersigned this date, after consideration of the arguments of the parties, IT IS, this 4th day of January, 1985,

ORDERED that the Motion to Quash Grand Jury Subpoena BE, and the same hereby IS, DENIED as to documents relating to the terms of employment and amount of money paid to Mr. Garber by Mr. Humphries.

IT IS FURTHER ORDERED that the Clerk of Court mail copies of this Order and the foregoing Opinion to counsel for the parties in this matter.

/s/
Edward S. Northrop
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
For The District Of Maryland

IN RE: SPECIAL GRAND JURY No. 2 September Term 1983	*	Civil Action No. N 84-4282
IN RE: GRAND JURY SUBPOENA Served upon William J. GARBER, ESQ.	*	
RONALD HUMPHRIES, Movant	*	

MEMORANDUM

By Order dated January 4, 1985, the Court denied the motion of Ronald Humphries to quash a grand jury subpoena. Mr. Humphries now moves for a stay of order pending appeal.

The motion must be denied. A petitioner's burden in seeking a stay pending appeal is a heavy one -- much heavier than when seeking a preliminary injunction. Goldstein v. Miller, 488 F.Supp. 156, 176 (D. MD. 1980), aff'd., 649 F.2d 863 (4th Cir.), cert. denied, 454 U.S. 828 (1981). In determing whether to issue a stay, this Court applies the four part test outlined by Judge Winter in Long v. Robinson, 432 F.2d 977, 979 (4th Cir. 1970):

> [A] party seeking a stay must show (1) that he will likely prevail on the merits of the appeal, (2) that he will suffer irreparable injury if the stay is denied, (3) that other parties will not be substantially harmed by the stay, and (4) that the public interest will be served by granting the stay.

The movant submitted for in camera review the documents at issue. After careful consideration of the documents and my previous order, I find little or no likelihood of movant prevailing on the merits. The documents solely concern fee arrangements and payments. These are exactly the type of documents not covered by the attorney-client privilege. Nor is there any other exception plausibly argued to preclude their admissibility.

If the documents are found to be privileged, movant may move to suppress them in any criminal proceedings against him. I find no "irreparable injury" in allowing the grand jury to consider them. Finally, I find no public interest in granting the stay.

A separate Order confirming the within ruling will be entered .

/s/
Edward S. Northrop
Senior United States District Judge

Dated: 21st January 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE: GRAND JURY SUBPOENA SERVED UPON WILLIAM J. GARBER, ESQ.	*	Civil Action No. N 84-4282
RONALD HUMPHRIES, Movant	*	

ORDER

In accordance with the foregoing Memorandum, and for reasons stated therein, IT IS, this 21st day of January, 1985, by the United States District Court for the District of Maryland, ORDERED:

1. That the Motion to Grant Stay of Order Pending Appeal BE, and the same hereby IS, DENIED; and

2. That the Clerk of Court shall mail copies of this Order and the foregoing Memorandum to counsel in this case.

/s/
Edward S. Northrop
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE: GRAND JURY SUBPOENA SERVED UPON WILLIAM J. GARBER, ESQ.	*	Civil Action No. N 84-4282
RONALD HUMPHRIES, Movant	*	

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ORDER

In accordance with the government's motion to Remove Documents Placed Under Seal, and for the reasons stated therein, IT IS, this 25th day of January, 1985, by the United States District Court for the District of Maryland,

ORDERED:

1. That the Motion to Remove Documents Placed Under Seal be, and the same hereby is, GRANTED; and

2. That the Clerk of Court shall deliver to the United States Attorney's Office for production to the Sepcial Grand Jury, No. 2, September Term 1983, all documents currently under seal relating to the terms of employment and amount of money paid to William J. Gerber,

Esquire, by Ronald Humphries.

3. That the Clerk of Court mail a copy of the Order to counsel for the parties in this matter.

/s/
Edward S. Northrop
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE: GRAND JURY SUBPOENA SERVED UPON WILLIAM J. GARBER, ESQ.	*	Civil Action No. N 84-4282
RONALD HUMPHRIES, Movant	*	

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It is Ordered this 25th day of January, 1985, pursuant to Rule 11(e) of the Federal Rules of Appellate Procedure, that the record in this case is retained for the use by this Court in the ongoing litigation. The Court further orders that the Notice of Appeal of Ronald Humphries from Order entered on January 4, 1985 is excepted from this Order and will be transmitted to the United States Court of Appeals, for the Fourth Circuit, together with a copy of this Order, the docket entries and copies of all pleadings filed in this case.

/s/
Edward S. Northrop
Senior United States District Judge

Supreme Court, U.S.
FILED
MAR 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-1100

In the Supreme Court of the United States

OCTOBER TERM, 1985

JOHN DOE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1985

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JOHN DOE, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that a grand jury subpoena requiring the production of the fee records of an attorney who had represented him in a prior unrelated case violates his Sixth Amendment right to counsel, his Fifth Amendment privilege against compelled self-incrimination, and the attorney-client privilege.

1. a. On October 18, 1984, a grand jury in the District of Maryland that was investigating possible criminal tax violations by petitioner issued a subpoena to attorney William J. Garber. The subpoena required Garber to produce a retainer agreement and fee records relating to his representation of petitioner in connection with a 1981 narcotics case in the District of Columbia. Pet. App. 2a-5a. On November 27, 1984, petitioner, through another attorney, unsuccessfully moved to quash the subpoena on the ground that the fee records were protected by the attorney-client privilege

(*id.* at 6a). The district court denied petitioner's motion for a stay pending appeal, concluding on the basis of an in camera review that the records "solely concern fee arrangements and payments" and, as such, "are exactly the type of documents not covered by the attorney-client privilege" (*id.* at 26a). The records in question were then released to the grand jury, which to date has not returned an indictment against petitioner.

b. The court of appeals affirmed the district court's denial of petitioner's motion to quash (Pet. App. 1a-17a; 774 F.2d 624). The court first rejected petitioner's argument that, because the subpoena created the possibility that Garber would be required to testify against petitioner at trial if an indictment were returned, the subpoena denied petitioner his asserted Sixth Amendment right to the assistance of counsel of his choice (Garber) at such a trial. In the court of appeals' view, there were a number of ways in which the records could be introduced at a trial (*e.g.*, by stipulation or through the testimony of a bookkeeper) without placing Garber in a conflict-of-interest situation and requiring his disqualification. Pet. App. 11a-12a. But in any event, the court was unwilling to accept the proposition that fee records are absolutely immune from production simply because there is a possibility that the attorney might be retained to represent the target again in subsequent proceedings (*id.* at 12a).

The court of appeals also rejected petitioner's contention that this case fell within an exception to the general rule that fee records are outside the scope of the attorney-client privilege—an exception petitioner contended was applicable because there was a strong prossibility that disclosure would implicate him in the very matter for which he sought legal advice in the first place. The court explained that the current grand jury investigation concerns possible criminal tax liability, a matter unrelated to the narcotics charges for which petitioner sought Garber's legal advice. Pet. App.

13a-15a. Finally, the court held that because the "subpoena in this case does not require [petitioner] to do anything and certainly does not compel him to be a witness against himself[,] * * * the fifth amendment provides no basis for quashing the subpoena" (*id.* at 16a).

2. The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Review by this Court therefore is not warranted.

a. As the court of appeals observed (Pet. App. 12a), petitioner does not challenge the settled principle that attorney-fee records are outside the scope of the attorney-client privilege, which protects only confidential communications by the client to his lawyer. See *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981); *Fisher* v. *United States*, 425 U.S. 391, 403 (1976). Petitioner argued below that such fee records nevertheless should be protected by the attorney-client privilege, even though no confidential communications would be disclosed, if there is a strong possibility that their disclosure would implicate the client in the very matter for which legal advice was sought in the first place. We agree with the courts of appeals that have rejected such an exception, which would have no relation to the privilege's purpose of protecting confidential communications by the client. See *In re Shargel*, 742 F.2d 61, 62 n.2, 63-64 (2d Cir. 1984); *In re Witnesses Before the March 1980 Special Grand Jury*, 729 F.2d 489, 493-495 (7th Cir. 1984); *In re Osterhoudt*, 722 F.2d 591 (9th Cir. 1983); *In re Slaughter*, 694 F.2d 1258, 1260 (11th Cir. 1982). See also *United States* v. *Ricks*, 776 F.2d 455, 465 (4th Cir. 1985).[1] The

[1]Any support petitioner's position might once have derived from the prior decisions of the Seventh and Ninth Circuits cited by the court of appeals (Pet. App. 14a, citing *Tillotson* v. *Boughner*, 350 F.2d 663 (7th Cir. 1965); *United States* v. *Hodge & Zweig*, 548 F.2d 1347, 1353 (9th Cir. 1977); and *Baird* v. *Koerner*, 279 F.2d 623, 635 (9th Cir. 1960)) has

appropriateness of such an exception is irrelevant for present purposes, however, because, as the court of appeals held, petitioner failed to show that there in fact was a strong possibility that disclosure of the fee information in the criminal tax investigation would implicate him in the narcotics charges for which he sought legal advice from Garber (Pet. App. 14a-15a). Petitioner does not dispute that fact-bound determination, and indeed he relies only in passing upon the attorney-client privilege (see Pet. 9).

b. Petitioner also argued below that the subpoena interfered with his asserted Sixth Amendment right to counsel of his choice because it created the possibility that Garber would be required to testify against him at any trial on the tax charges and thereby lead to Garber's disqualification at such a trial. This argument was properly rejected by the court of appeals. Pet. App. 10a-11a.

There is no Sixth Amendment right to counsel in connection with a grand jury proceeding. The right to counsel attaches only after the initiation of adversary judicial proceedings against the defendant, by indictment or otherwise. *Moran* v. *Burbine*, No. 84-1485 (Mar. 10, 1986), slip op. 14-18; *United States* v. *Gouveia*, No. 83-128 (May 29, 1984), slip op. 6-8. Moreover, even where the protection of the Sixth Amendment has attached, it does not afford the accused an absolute right to be represented by a particular lawyer. The accused is protected, if at all, only against an arbitrary disqualification of counsel. See *In re Doe*, 781 F.2d 238, 250 (2d Cir. 1986) (en banc), petition for cert. pending, No. 85-1334. Disqualification of a lawyer at trial by application of the established ethical principle that a

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since been eliminated by the subsequent decisions by those courts in *In re Witnesses Before the March 1980 Special Grand Jury*, *supra*, and *In re Osterhoudt*, *supra*, cited in the text.

person cannot be both a witness and a lawyer in the same case (if indeed disqualification were ultimately required) is scarcely arbitrary. See *In re Klein*, 776 F.2d 628, 633 (7th Cir. 1985).

Moreover, in this case, any potential right petitioner might possess to have a particular lawyer (Garber) represent him at trial (should he be indicted) was clearly outweighed by the grand jury's right to the fee records. In fact, petitioner's asserted right to counsel of his choice is not significantly implicated by the decision below. The subpoena only sought Garber's fee records in connection with his prior representation of petitioner. Garber was not required to testify or even appear before the grand jury. In addition, as the court of appeals observed (Pet. App. 11a-12a), if petitioner ultimately is indicted, the government would be prepared to consider the production of the records at a prospective trial in a manner (*e.g.*, by stipulation or through the testimony of a bookkeeper) that would not require Garber to testify and therefore to be disqualified from representing petitioner as a result.

As petitioner concedes (Pet. 12), a number of courts of appeals have specifically rejected the notion that the government must demonstrate a particularized need in order for the grand jury to subpoena fee information from a lawyer. *In re Klein*, 776 F.2d 628, 632-634 (7th Cir. 1985); *In re Grand Jury Investigation*, 769 F.2d 1485, 1487 (11th Cir. 1985); *In re Grand Jury Proceedings (Weiner)*, 754 F.2d 154, 155-156 (6th Cir. 1985); *In re Grand Jury Proceeding (Schofield)*, 721 F.2d 1221, 1222 n.1 (9th Cir. 1983); cf *In re Osterhoudt*, 722 F.2d at 594-595. Nor, contrary to petitioner's contention (Pet. 12), is there a circuit conflict on this question. Petitioner cites (*ibid.*) the panel decision in *In re Doe*, 759 F.2d 968 (2d Cir. 1985), which held that such a subpoena could be enforced only if the government made a preliminary showing that the information was necessary for

the grand jury's investigation and was not reasonably available from a source other than the attorney. 759 F.2d at 976-977. However, since the petition for a writ of certiorari was filed in this case, the Second Circuit, sitting en banc, has reversed the panel decision upon which petitioner relies and held that no such threshold showing is required. *In re Doe*, 781 F.2d 238 (2d Cir. 1986) (en banc), petition for cert. pending, No. 85-1334.[2]

Petitioner also relies (Pet. 12) on a decision of another panel of the Fourth Circuit that likewise required a threshold showing of need. *In re Special Grand Jury No. 81-1 (Harvey)*, 676 F.2d 1005 (1982). However, as petitioner concedes, the Fourth Circuit granted rehearing en banc in *Harvey*, and the panel's decision in that case subsequently was vacated by the en banc court because the target became a fugitive. *In re Special Grand Jury No. 81-1 (Harvey)*, 697 F.2d 112 (1982). The panel decision in *Harvey* therefore is of no precedential force in the Fourth Circuit (see *United States* v. *Ricks*, 776 F.2d 455, 465 (4th Cir. 1985); *United States* v. *Morchower*, 718 F.2d 1093 (4th Cir. 1983) (Table)), and indeed the panel of the Fourth Circuit in the instant case did not follow *Harvey*.

The final appellate decision relied upon by petitioner (Pet. 8, 10), *In re Grand Jury Matters*, 751 F.2d 13 (1st Cir. 1984), likewise does not support his claim. The First Circuit in that case affirmed an order quashing grand jury subpoenas that required defense attorneys to appear and produce fee and other records in connection with an investigation of the same activities for which their clients were facing an imminent trial in state court. The court of appeals refused to overturn the district court's determination that, because

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[2]By orders dated February 19 and February 24, 1986, respectively, Justice Marshall and Justice Brennan denied an application for a stay of enforcement of the subpoena in the Second Circuit case. No. A-610.

the *timing* of the subpoenas threatened to disrupt the attorneys' performance in the state proceedings and constituted harassment, the government was required to establish that the subpoenaed information was needed at that particularly sensitive moment (751 F.2d at 17-19). The situation in the instant case is wholly different, because Garber's representation of petitioner on the narcotics charges has long since terminated. Moreover, the First Circuit in *In re Grand Jury Matters, supra,* like the court of appeals in the instant case, rejected the argument that the mere possibility that compliance with a subpoena might lead to the disqualification of the attorney from further representation of the client is a "determinative objection" that justifies quashing a subpoena. 751 F.2d at 19.[3]

c. The court of appeals also was clearly correct in concluding that petitioner's Fifth Amendment privilege against compelled self-incrimination was not violated by the subpoena requiring Garber to produce the fee records (Pet. App. 16a). That subpoena did not compel petitioner to do anything. See *United States* v. *Doe*, 465 U.S. 605, 611-612 (1984); *SEC* v. *Jerry T. O'Brien, Inc.*, No. 83-751 (June 18, 1984), slip op. 6.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

MARCH 1986

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[3]In a later decision sustaining the enforcement of a subpoena issued to an attorney, the First Circuit explained its decision in *In re Grand Jury Matters, supra,* as having been based on "unique factors," including the timing of the subpoena and the finding of harassment. *In re Grand Jury Proceedings (Wilson)*, 760 F.2d 26, 27 (1st Cir. 1985).